

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	In Proceedings
)	Under Chapter 11
WEST ACCESS MARINA, INC.))	
)	No. BK 88-30672
Debtor(s).)	
)	
UNITED STATES OF AMERICA))	
SECRETARY OF THE ARMY,)	
CORPS OF ENGINEERS,)	
)	
Plaintiff(s),)	
)	
vs.)	
)	
WEST ACCESS MARINA, INC.))	
)	
Defendant(s).)	

O R D E R

This matter is before the Court on a Motion for Relief from Stay filed by the Secretary of the Army, Army Corps of Engineers ("Corps") and a Motion for Approval of Assumption of Unexpired Lease filed by debtor-in-possession West Access Marina, Inc. ("debtor"). For the reasons cited below, the Court finds that the lease may not be assumed by the debtor and that the Corps is entitled to relief from the automatic stay.

Debtor has operated a marina on Carlyle Lake, Illinois since 1968 on premises it leases from the Corps. The present lease, which has a scheduled term of twenty-five years, was executed on September 8, 1982. Debtor states that since the execution of the lease it has made several improvements including increasing the capacity of the dock facilities from 140 to 366 boats, and the addition of a boat repair facility, a boaters' lounge and a ship supply store.

In its motion for relief from stay, the Corps argues, inter alia, that under 11 U.S.C. §365 (c)(1) a trustee may not assume the lease because applicable law excuses the Corps from accepting performance from anyone but the party which originally signed the lease, and that debtor, acting as debtor-in-possession, is not the party which originally signed the lease but rather is essentially the same as a trustee in bankruptcy.¹ The Corps cites the anti-assignment statute at 41 U.S.C. §15 as the applicable law which excuses it from accepting the debtor's attempted assumption of the lease. As an alternative, the Corps cites other statutes and regulations that give it authority to enter into leases, such as the one in the present case, which contain anti-assignment clauses.

In response, debtor claims that the anti-assignment statute does not apply to leases, only to executory contracts. Debtor further claims that the authority given to the Corps to enter into leases does not transform the non-assignment clauses in those leases into applicable law for purposes of 11 U.S.C. §365(c)(1).

Generally, a trustee is permitted to assume or reject any executory contract or unexpired lease subject only to the court's approval. 11 U.S.C. §365(a). An exception to the general rule is

¹The Corps also argues that: 1) the lease terminated prior to the filing of the bankruptcy and, therefore, is not assumable; 2) it is within the Corps' regulatory power to revoke and terminate the lease and the automatic stay does not prevent a governmental unit from taking action to enforce its regulatory power; and 3) the debtor must cure all defaults under the lease before it can be allowed to assume it. In light of the Court's decision that debtor is barred by applicable law from assuming the lease, the Court need not address these other arguments.

found at 11 U.S.C. §365(c)(1) which provides:

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment.

Under 11 U.S.C. §1107(a), the debtor-in-possession in a Chapter 11 case essentially has all the rights, powers and duties of a trustee. The debtor-in-possession is also subject to any of the limitations on a trustee. S.Rep. No. 95-989, 95th Cong. 2d Sess. 116, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5902; H.Rep. No. 95-595, 95th Cong. 2d Sess. 404, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6360. Thus, 11 U.S.C. §365(c)(1) would similarly restrict the right of a debtor-in-possession to assume an executory contract or unexpired lease. Matter of West Electronics, Inc., 852 F.2d 79, 82 (3rd Cir. 1988); In re Pioneer Ford Sales, Inc., 727 F.2d 27, 28 (1st Cir. 1984).

The words "applicable law" as used in 11 U.S.C. §365(c)(1) mean "applicable non-bankruptcy law." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 348, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6304; S. Rep. No. 95-989, 95th Cong., 2d Sess. 59, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5845; Pioneer Ford Sales, supra.

Therefore, if applicable nonbankruptcy law provides that the Corps would have to consent to the assignment of the lease to a third party, i.e., someone other than the debtor or the debtor-in-possession, then West Access Marina, as the debtor-in-possession cannot assume that lease without the Corps' consent. West Electronics, supra at 83. This prohibition limiting assumption of leases is applicable to any contract or unexpired lease subject to a legal prohibition against assignment. Id.; Pioneer Ford Sales, supra.

The "applicable law" cited by the Corps is the antiassignment statute found at 41 U.S.C. §15 which states in relevant part:

No [government] contract....or any interest therein, shall be transferred by the party to whom such contract ... is given to any other party, and any such transfer shall cause the annulment of the contract...transferred, so far as the United States is concerned.

Debtor argues that this statute is not applicable to the present case because it only prohibits the assignment of contracts while the assignment of unexpired leases is not prohibited. Although the Court tends to disagree with this argument,² it need not decide this issue because there is other applicable law concerning the assignment of the lease.

Under 16 U.S.C. §460d, the Secretary of the Army is authorized to

²Debtor cites Friedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494 (1887), in support of its contention that 41 U.S.C. §15 does not apply to leases. This Court believes that Shepherd is distinguishable on its facts. Furthermore, there is recent case law which states that 41 U.S.C. §15 applies to oil and gas leases. See, Naartex Consulting Corp. v. Watt, 542 F.Supp. 1196, 1204 (D.D.C. 1982), aff'd. 722 F.2d 779 (D.C. Cir. 1983). This leaves open the question of whether the lease in the present case would be subject to the anti-assignment statute.

grant leases of lands...at water resource development projects for such periods and upon such terms and for such purposes as he may deem reasonable in the public interest" (emphasis added).³ The Secretary has enacted several regulations concerning leases, including one that prohibits a sublease or the assignment of a lease without departmental approval. 32 CFR §643-57. The Secretary's authority over leases has been delegated to local Corps of Engineer districts pursuant to Internal Regulation No. EP 405-1-2, dated April 1, 1985, and by letter dated July 2, 1981. See, USA's Additional Brief in Support of its Motion for Relief from Stay, exhibits A and B.

The lease in the present case, which was signed by the District Engineer of the local Corps district pursuant to the previously cited grant of authority, contains the following provision:

13. The lessee shall neither transfer nor assign this lease nor sublet the premises or any part thereof, nor grant any interest, privilege, or license whatsoever in connection with this lease without permission in writing from the District Engineer. The provisions of any subleases shall be subject to prior approval of the District Engineer.

USA's Brief in Support of Motion for Relief from Stay, exhibit A, p. 6. The district engineer apparently considered it in the public interest to put this non-assignability clause in the lease.

Debtor argues that the mere fact that the Corps had the authority to put a non-assignability clause in the lease does not mean that the assumption or assignment of the lease is restricted by applicable law

³Additional statutory authority in support of the Secretary's right to lease property can be found at 10 U.S.C. §2667.

for purposes of 11 U.S.C. §365(c)(1). This argument has essentially been refuted by the decision of the Fifth Circuit in In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983). One of the questions facing the Court in that case was whether Braniff, as a Chapter 11 debtor-in-possession, was barred by 11 U.S.C. §365(c) from assuming its lease of airport terminal space at Washington National Airport and then assigning that lease to another airline, PSA, without approval of the Federal Aviation Administration ("FAA"). The Court found that applicable law excused the government from accepting performance under the lease from the assignee, PSA. Id. at 935.

As the "applicable law," the Braniff court cited portions of the Washington Airport Act, 7 D.C. Code §§1101-1107, which gives the administrator of the FAA the authority to lease space within the airport "upon such terms he may deem proper." Id. The Court also cited FAA regulations promulgated pursuant to the statute which prevent persons from engaging in commercial activity at the airport without approval of the airport manager. Based on this general grant of authority, the Fifth Circuit concluded that no one could lease space at National Airport without FAA approval and that, pursuant to 11 U.S.C. §365(c), the FAA was excused from accepting performance from PSA. Id.

The facts in Braniff are analogous to those in the present case in that both government agencies, the FAA in Braniff and the Corps in this case, acted to restrict the unapproved assignment of leases under a general grant of statutory and regulatory authority. Debtor attempts to distinguish Braniff by pointing out that while the Braniff court raised the issue in terms of assumption and assignment of the lease,

only the assignment to PSA was actually decided. The Braniff decision is silent on the question of whether the FAA was excused from accepting performance by Braniff when Braniff assumed the lease as debtor-in-possession.

The question of whether a creditor is excused from accepting performance of a contract or unexpired lease from a debtor-in-possession was finally answered by the Third Circuit in the recently decided case of Matter of West Electronics, Inc., supra. In that case the court held that a Chapter 11 debtor-in-possession could not assume a contract where applicable law did not entitle the debtor to assume the contract without the government's consent and the government was unwilling to give that consent. Id. at 83.

Debtor, citing Judge Higginbotham's dissent in West Electronics, argues that the non-assignment clause in the lease bars the assignment of the lease to a wholly unrelated third party but it does not bar the assumption of the lease by the debtor-in-possession. Debtor's position is that it is basically the same entity it was prior to filing its bankruptcy petition.

The majority of the court in West Electronics rejected debtor's position. They felt that by including the words "or the debtor in possession" in 11 U.S.C. §365(c)(1), Congress "wanted that section to reflect its judgment that in the context of the assumption and assignment of executory contracts, a solvent contractor⁴ and an insolvent debtor in possession going through bankruptcy are materially

⁴The debtor in West Electronics was a government contractor.

distinct entities." Id. The decision in West Electronics is consistent with this Court's holding that "the debtor-in-possession, though physically the same as the debtor, is conceptually separate for purposes of bankruptcy law...." In re Wiggs, 87 B.R. 57, 58 (Bankr. S.D. Ill. 1988). Additionally, other courts have held that debtors-in-possession may not assume contracts or unexpired leases where applicable law excuses the government from accepting performance from an assignee and the government does not consent to the assumption by the debtor-in-possession. In re Pennsylvania Peer Review Organization, Inc., 50 B.R. 640 (Bankr. M.D. Pa. 1985); In re Nitec Paper Corporation, 43 B.R. 492 (S.D. N.Y. 1984); In re Adana Mortgage Bankers, Inc., 12 B.R. 977 (Bankr. N.D. Ga. 1980).

Debtor next argues that 11 U.S.C. §365(c) applies only to the assignment of personal service contracts. The plain language of the statute proves that debtor's position is in error. The statute refers generally to contracts. It does not limit its effect to personal service contracts. Pioneer Ford Sales, Inc., supra at 29; Braniff, supra at 943; Nitec Paper, supra at 494.

Finally, debtor states that if the stay is lifted and the lease is terminated by the Corps then any chance of successful reorganization would be ended and the Corps would receive a windfall in the form of the substantial improvements debtor has made on the leased premises. Debtor urges the Court to use its equitable powers to avoid such a result.

As this Court has noted previously, "the bankruptcy court's powers as a court of equity do not allow it to rewrite specific provisions of

federal and state law concerning the rights of a trustee or debtor-in-possession." In re Salem Energy Supplies and Services, Inc., 92 B.R. 361, 364 (Bankr. S.D. Ill. 1988). See also, In re Wiggs, supra at 59. In the present case, 11 U.S.C. §365(c)(1) specifically restricts the right of the debtor to assume the lease because applicable law excuses the Corps from accepting performance absent its consent and the Corps does not consent. Therefore, debtor does not have a legally cognizable interest in the lease and it would be an abuse of this Court's discretion to decline to lift the stay. West Electronics, supra at 83-4.

IT IS THEREFORE ORDERED that the Motion for Approval of Assumption of Unexpired Lease filed by West Access Marina, Inc., is DENIED.

IT IS FURTHER ORDERED that the Motion for Relief from Stay filed by the Secretary of the Army, Army Corps of Engineers, is GRANTED.

_____/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: February 23, 1989